and depend entirely upon affiliation fees and advertising revenues to fund their operations.[16] However, nothing in Section 612 precludes cable operators from paying quality programmers for carriage. As explained by Programmers in their Comments, the legislative history accompanying the 1984 Act specifically states that "in using the term 'leased access,' the Committee does not intend only leasehold relationship[s] between programmers and cable operators to be permissible." *Programmers' Comments* at 35, citing H.R. Rep. No. 934, 98th Cong., 2d Sess. 48 (1984). Indeed, the economics of program carriage agreements demonstrate that cable operators place a high value on quality programming and are willing to pay license fees for such programming that often outweighs the revenue received by these channels for advertising. *See, e.g. Comments of Tele-Communications, Inc.* at 14 (demonstrating that licensing fees usually outweigh advertising revenues to cable systems). Thus, start-up programming networks must be permitted to be carried on leased access channels, and to satisfy cable operators' leased access carriage obligations, notwithstanding operators' payment of license fees to such networks.

C. Section 612 Does Not Support Preferential Treatment For Non-Profit Or Local Programmers

The Commission, in proposing preferences for certain types of programming entities, and parties filing in support of the Commission's proposed preferences, have made some assumptions about the favored nature of certain programming that have no support in the text of Section 612 or its legislative history. While certain programming entities present

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[16]Indeed, even leased access users admit that they cannot truly afford to pay anything for carriage. *See, e.g., Comments of United Broadcasting Company d/b/a Telemiami* at 16-21 (recommending "nominal rate" or credit for advertising so that "no cash need change hands").

impassioned pleas about their need for carriage, the bottom line is that none has offered any support as to why leased commercial access is the proper solution. The fact that leased access may appear to be the only remaining form of mandatory access even remotely available to these entities is insufficient to warrant its use for purposes other than those for which it was intended. The Commission, in its effort to good, must not exceed the scope of its delegated authority.

For example, several commenters assume that their non-profit status automatically renders their programming superior in content to that of conventional programmers and entitles them to privileges under leased access that other programmers do not enjoy.[17] As pointed out by Programmers in their Comments, the category of "non-profit" is far too unspecific to ensure that only those entities that truly offer diverse programming would receive preferential leased access treatment. As demonstrated by the *Comments of Pennsylvania Network*, the first educational cable television network in the nation, and the *Comments of PBS Horizons*, a cultural and educational program service, both of which are publicly supported stations, high quality, local and educational programming (without commercial interruptions) exists that may actually be displaced by nonprofit, commercial programmers. Moreover, as Programmers also demonstrated in their Comments, many non-profit entities actually generate annual revenues substantially in excess of most start-up programming networks. In the words of Pennsylvania Network, such entities "should properly be supported by their own constituencies rather than subsidized by cable."

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[17]*See, e.g., Comments of CME* at 15 (insinuating that The Golf Channel does not qualify as new and diverse programming).

Comments of Pennsylvania Network at 6. Finally, non-profit companies have an alternative outlet that new, start-up programming networks do not have—PEG access channels. The number of PEG channels is increasing significantly as more and more cable franchises come up for renewal.[18] *Programmers' Comments* at 11.

Nor does "local" programming necessarily translate to "diversity." One commenter, Visual Information Providers for Non-Discriminatory Access ("VIPNA"), urges the Commission to adopt a preference for local leased access program producers. Similarly, LPTV operators focus on the local nature of their programming. While localism is certainly a worthwhile goal, many of the commenters advancing localism are actually producers of local infomercials. *See, e.g., Comments of VIPNA* at 8 (stating that it produces programming for local businesses); *Comments of Sunbelt Video, Inc.* at 1 ("We sell photo display advertising with a music background on all systems."); *Comments of RK Production Company* at 1. As explained in Programmers' Comments, there is no shortage of channel space for infomercials, nor do infomercials promote diversity in programming. *See generally Comments of Access Television Network* (a reseller of remnant time to infomercial producers).

LPTV operators also plead for mandatory access. However, it is highly questionable whether LPTVs should qualify for leased access carriage at all, let alone receive a preference. LPTVs fought hard in 1992 to obtain preferential must-carry carriage rights. In granting the broadcasting industry preferential rights to one third of cable operators' channel capacity,

[18]CME complains that PEG access does not provide an adequate outlet for nonprofit programmers because it is local in nature and is not conducive to national coordination and distribution. *Comments of CME* at 21. However, leased access is also accommodated at the local level, on a system by system basis, and thus, PEG access channels are equally well-suited to CME's needs as is leased access.

Congress gave LPTVs a very specific and narrow right: the right to carriage in limited rural markets when the low power station's programming fulfills local news and informational needs not served by full power stations. As the Conference Report explained: "The conferees believe that, in communities in which residents have limited access to the signals of full power stations providing local news and information, the public interest in receiving local news and information warrants carriage of such low power stations." H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 74 (1992). Allowing LPTVs to gain mandatory commercial leased access carriage outside of those confines not only would be inconsistent with the Act, but would constitute a blatant end run around Congress' clearly expressed intent. 2A Sutherland, *Statutory Construction* § 46.05 at 103-05 (sections of statute to be construed consistently with whole statute); *Norfolk & Western Railway Co. v. American Train Dispatchers' Ass'n*, 499 U.S. 117, 128 (1991)(administrative agency must give effect to Congress' expressed intent).

The Commission must not equate leased access to a last chance for certain programmers that are unable or unentitled to obtain carriage through must-carry or PEG access, or in the marketplace. The Commission's authority in the field of leased access is limited, and it should resist entreaties that it utilize leased access to accomplish what Congress has chosen not to authorize.[19]

[19]Notably, ValueVision has already indicated that if leased access rates are not substantially reduced, it intends to acquire six broadcast licenses (for which licenses it has already applied) so that it can gain carriage on cable systems through must carry. *CableFAX Daily*, May 29, 1996 at 1 (Phillips Business Information, Inc., Maryland).

V. REGARDLESS OF THE APPROACH ADOPTED BY THE COMMISSION, IT CANNOT MANDATE CARRIAGE OF LEASED ACCESS PROGRAMMING ON THE BASIC OR EXPANDED BASIC TIER

In mandating carriage of leased access on the basic or expanded basic tier, the Commission effectively would give a preference to leased access users, such as home shopping and infomercial networks, while disadvantaging start-up programming networks who would then be either totally displaced from the system or relegated to a higher tier with significantly less penetration. Cable operators have demonstrated why such a proposal is inconsistent with text and legislative history of Section 612 as well as unfair to cable systems and potentially more disruptive to subscribers. *See, e.g., Comments of Tele-Communications, Inc.* at 21-25; *NCTA Comments* at 28-31. Programmers offer another perspective.

Cable systems' channel lineups and rates are structured such that the number of channels available to programming networks on basic or expanded basic is limited. Meanwhile, the greatest number of subscribers receive the basic or expanded basic tier, which translates directly to increased distribution, and therefore greater affiliation and advertising revenues for programming networks that are carried on those tiers. In order to compete for these greater revenues, new programming networks must be able to compete for access to the limited number of channels on basic or expanded basic. If the Commission were to require cable systems to carry leased access programmers on basic or expanded basic, the number of channels on those tiers that would remain available to new programming networks would be substantially reduced. As a consequence of not being carried on cable systems' basic or expanded basic tiers, programming networks such as Programmers would suffer reduced distribution and diminished revenues. The Commission should leave channel placement negotiation to the cable system and the leased access user.[20]

VI. CONCLUSION

Revision of the leased access rate formula in a way that substantially reduces rates and artificially spurs demand for leased access channels will result in displacement of new, diverse programming networks -- networks that the American public has long awaited -- by home shopping, infomercials and low quality programming. The Commission can avoid such an undesirable and unjust result by adopting a rate formula that accurately reflects the true value of a channel or, alternatively, by either (1) adopting Programmers' proposed transition plan, or (2) clarifying that start-up networks may satisfy cable systems' leased access set-aside requirements.

Respectfully submitted,

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May 31, 1996

[20]Indeed, even a leased access user, Lorelei Communications, Inc. d/b/a The Firm, proposes that cable systems be afforded some discretion in deciding where to place leased access channels. *Comments of Lorelei Communications, Inc. d/b/a The Firm* at 9.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Commercial Leased Access	MM Docket No. 92-266 CS Docket No. 96-60

SECOND AFFIDAVIT OF ROGER WILLIAMS

1. I, Roger Williams, am Executive Vice President and Chief Operating Officer of Outdoor Life Network ("Outdoor Life"), and Speedvision Network ("Speedvision"). I have given a previous affidavit in this proceeding, which was submitted in support of, and as an attachment to, the Comments filed by Outdoor Life Network, Speedvision Network, The Golf Channel, and BET On Jazz (collectively, "Programmers").

2. The purpose of this affidavit is to provide additional information in support of the Reply Comments that Programmers are presently submitting in response to comments filed by other parties concerning the *Further Notice of Proposed Rulemaking* ("NPRM"). In particular, this affidavit is intended to explain the basis for, and rationale of, the transition period recommended by Programmers in their Comments and Reply Comments.

3. In developing its original business plan, Outdoor Life Network and Speedvision Network (collectively, "the Networks") relied heavily upon reasonable assumptions regarding both then-extant channel availability on cable systems nationwide and on estimated increases in cable systems' channel capacity that were expected to develop over the following ten years.

The Networks' estimates of growth in channel capacity were not unlike the Commission's own forecast, in its "going forward" *Order*,[1] that cable systems would increase channel capacity at a rate of nearly three channels per year. Based on those assumptions, Outdoor Life and Speedvision estimated that it would take at least five years from their launch dates in June 1995 and January 1996, respectively, in which to attain subscriber penetration of 20 to 25 million each, the level necessary to cover costs, begin making a profit and become commercially viable.

4. Outdoor Life and Speedvision presently have 3.1 and one million subscribers, respectively. Growth to date has been hindered by a number of factors, including among others the lack of available channel capacity on cable systems, the failure of channel capacity to expand as rapidly as predicted through digital compression and other technological advances, and even the "chill" that has been cast by the pendency of the Commission's current leased access proposals on cable operators' willingness to launch, or negotiate future carriage agreements with, new networks such as Outdoor Life and Speedvision.

5. A formula that reduces rates for leased access users substantially below market value, such as the cost/market formula proposed by the Commission, will artificially boost usage of leased access set-aside channels, many of which are currently used to carry new networks such as the Networks. In doing so, the formula necessarily will result in a dramatic reduction in channel capacity available to start-up programmers. This reduction, both in existing channel availability and in the extent to which the Networks can expect to be carried

[1] *Sixth Order on Reconsideration*, In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation, 10 FCC Rcd. 1226 (1994) at Appendix C, 1316-1319.

on newly added channels as systems' channel capacities expand, will significantly impede the Networks' ability to increase distribution, particularly in the crucial early years of the Networks' development. Consequently, the time that it will take the Networks to increase distribution to 20 to 25 million subscribers, the Networks' break-even point, will be substantially lengthened. Indeed, if the Commission were to adopt its proposed formula and apply only a three year transition, as it suggested by way of example in its NPRM[2], it is almost a certainty that our Networks could not survive long enough to obtain sufficient distribution to reach break-even, given the Networks' substantial start-up and programming costs and early year losses. It is these dire consequences that have led the Networks to oppose so strenuously the Commission's proposed revisions to the existing maximum implicit fee leased access formula and, in the event that the formula must be revised, to support the formulation proposed by the National Cable Television Association.

6. These same factors have also prompted the Networks to propose that, should the Commission adopt any formula that results in a leased access rate that is lower than the current maximum implicit fee, the Commission accompany such change with a sufficient transition period to allow the industry, and in particular new program networks such as Outdoor Life and Speedvision, to adjust to the change in a way that will minimize the harm that the resulting reduction in distribution would otherwise be certain to cause. In particular, the Networks have proposed a detailed transition plan tailored to the Commission's proposal

[2] *Further Notice of Proposed Rulemaking*, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation -- Leased Commercial Access, MM Docket No. 92-266, CS Docket No. 96-60, FCC 96-122 (released March 29, 1996) at ¶ 99.

to adopt its cost/market formula. While this transition plan will still result in much slower subscriber growth than the Networks assumed in their original business plan -- with penetration of 20 to 25 million not being attained until at least their sixth year of operation, if not later -- it would at least give the Networks a chance of reaching break-even and ultimate commercial viability. Absent a transition provision of the type proposed here, the Commission's adoption of its proposed leased access formula would be certain to cause the failure of our networks. In the following paragraphs, I will explain the reasons for the principal features of our suggested transition plan.

7. First, should the FCC adopt its proposed cost/market formula, it will take at least six years for the Networks to increase distribution on cable systems and other multi-channel video program distributors, and to develop a level of subscriber recognition and loyalty -- assuming that our proposed transition plan is also adopted -- sufficient to withstand the impact on distribution that full application of the Commission's reduced-rate formula to all set-aside channels inevitably will cause. Moreover, it will be at least six years until cable systems' channel capacity will have grown enough both to accommodate the full complement of leased access set-aside channels *and* to enable cable operators to carry start-up networks such as the Networks in sufficient numbers to support their continued operations. For these reasons, we are proposing that the overall transition period be no less than six years.

8. Second, a reduced-rate formula should not apply to any cable system with 72 or fewer activated channels until the expiration of the six year transition period, or until system upgrades cause channel capacity to exceed 72 channels, whichever occurs first. Cable systems with 72 or fewer activated channels generally are channel-locked, having virtually no

available channel capacity on which to add new programming networks such as Outdoor Life and Speedvision; indeed such systems generally are still at the phase of adding more established programming networks such as A&E or Discovery. If the Commission's proposed formula were to be applied to such systems, any remaining chance of the Networks being carried by any of these systems would be lost, and the Networks would likely be bumped by those few systems in this size group that do carry the Networks. Cable systems with 72 or fewer channels cannot be subjected to the new rate formula if the Networks, and other start-up networks, are to succeed in increasing distribution to the level necessary to become commercially viable.

9. Third, the initial years of the six year transition period are the most critical to the success of Outdoor Life, Speedvision and other start-up networks. The Networks are currently scheduled to launch on a number of systems, and are in the midst of negotiations with others. To date, the mere pendency of the Commission's leased access proposals has chilled cable systems' willingness to enter into, or even discuss, carriage agreements with the Networks. In order that the Commission's adoption of a reduced leased access rate formula not sabotage the Networks' completion of both their scheduled launches and their current negotiations, the Networks need at least one year in which the new rate formula would not be applied to cable systems, so that such burgeoning relationships not be undermined.[3]

10. Fourth, it is also critical to the Networks' success that the rate formula be

[3]We do not seek this one-year hiatus with cable systems that have 130 or more channels, since such systems generally already possess sufficient capacity to accommodate increased leased access obligations without foregoing their ability to carry start-up networks like Outdoor Life and Speedvision.

phased in gradually over years two through six, such that application of a reduced leased access rate formula would apply less in early years, and then to an increasing percentage of cable systems' set-aside requirements in each successive year. In particular:

a. A reduced-rate formula should be phased in for systems with between 73 and 89 activated channels, beginning with application of the revised rate to 10 percent of channel set-asides by the end of year two, increasing to 25 percent by the end of year three, 45 percent by the end of year four, 70 percent by the end of year five, and 100 percent by the end of year six. Start-up programming networks have their greatest chance of being carried, if at all, by cable systems with more than 72 activated channels. Application of the Commission's proposed formula to cable systems of this size without a graduated transition would result in the Networks, and other start-up programming networks, being bumped from, or not being added by, such systems during the next several years, the most crucial for the Networks and other new programmers.

b. The Commission's proposed formula should also be phased in for systems with between 90 and 129 channels, albeit at a slightly accelerated rate, beginning with application of the revised formula to 15 percent of channel set-asides by the end of year two, increasing to 35 percent by the end of year three, to 60 percent by the end of year four, to 90 percent by the end of year five, and to 100 percent by the end of year six. Systems of this size are also crucial to the Networks' ability to obtain distribution. However, because of their greater channel capacity, it would be possible for such systems to introduce the Commission's proposed cost/market formula at a slightly accelerated rate without inordinately interfering with the launch of new networks such as Outdoor Life and Speedvision. This factor has been reflected in the increased rate of transition.

11. Finally, the Networks believe that it is not necessary to have any delay in implementation of the Commission's proposed formula to cable systems with 130 or more channels. Such systems would appear to have adequate capacity to immediately introduce a revised leased access formula without significantly impacting their carriage of start-up networks.

12. The Networks' proposal of the transition provision described herein should not be deemed to indicate approval, in any manner, of the Commission's proposed leased access formula. The Networks oppose that formula, and alternatively believe that, if the current maximum implicit fee formula is to be revised, the formula proposed by NCTA should be adopted instead. It is only in the event that the FCC rejects our position, and goes forward with its proposed cost/market formula, that we propose the adoption of the foregoing transition plan.

13. Finally, in the event that the Commission does not adopt its cost/market formula, but adopts some other formula (including the NCTA formula) that nonetheless has the effect of reducing fees for leased access from current maximum implicit fee rates, the Networks submit that the Commission must include an appropriate transition provision consistent with the transition plan described above. Any such transition plan should take into consideration the extent to which the current maximum implicit fee formula is reduced, and should tie implementation of the new formula to growth in cable systems' channel capacity. As above, such transition plan should include a first year hiatus during which the revised leased access rate formula would not be applied to leased access channels on any system having fewer than 130 channels, and should introduce the application of the new formula in years two through six on a graduated basis.

I, Roger Williams, certify, under penalty of perjury, that the foregoing information is true and correct to the best of my knowledge, information and belief.

Roger Williams

May 31, 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Commercial Leased Access	MM Docket No. 92-266 CS Docket No. 96-60

SECOND AFFIDAVIT OF CHRISTOPHER R. MURVIN

1. I, Christopher R. Murvin, am Senior Vice President, Legal and Business Affairs, and Secretary, of The Golf Channel. I have given a previous affidavit in this proceeding, which was submitted in support of, and as an attachment to, the Comments filed by Outdoor Life Network, Speedvision Network, The Golf Channel, and BET On Jazz (collectively, "Programmers").

2. The purpose of this affidavit is to provide additional information in support of the Reply Comments that Programmers are presently submitting in response to comments filed by other parties concerning the *Further Notice of Proposed Rulemaking* ("NPRM"). In particular, this affidavit is intended to explain the basis for, and rationale of, the transition period recommended by Programmers in their Comments and Reply Comments.

3. In developing its original business plan, The Golf Channel relied heavily upon reasonable assumptions regarding both then-extant channel availability on cable systems nationwide and on estimated increases in cable systems' channel capacity that were expected to

develop over the following ten years. The Golf Channel's estimates of growth in channel capacity were not unlike the Commission's own forecast, in its "going forward" *Order*,[1] that cable systems would increase channel capacity at a rate of nearly three channels per year. Based on those assumptions, The Golf Channel estimated that it would take at least three to five years from its launch date in January 1995 in which to attain subscriber penetration of 20 million, the level necessary to cover its costs, begin making a profit and become commercially viable.

4. The Golf Channel presently has 2.5 million subscribers. Growth to date has been hindered by a number of factors, including among others the lack of available channel capacity on cable systems, the failure of channel capacity to expand as rapidly as predicted through digital compression and other technological advances, and even the "chill" that has been cast by the pendency of the Commission's current leased access proposals on cable operators' willingness to launch, or negotiate future carriage agreements with, new networks such as The Golf Channel.

5. A formula that reduces rates for leased access users substantially below market value, such as the cost/market formula proposed by the Commission, will artificially boost usage of leased access set-aside channels, many of which are currently used to carry new networks such as The Golf Channel. In doing so, the formula necessarily will result in a dramatic reduction in channel capacity available to start-up programmers. This reduction, both in existing channel availability and in the extent to which The Golf Channel can expect to be carried on newly added channels as systems' channel capacities expand, will significantly impede The Golf Channels' ability to increase distribution, particularly in the crucial early years of the network's

[1] *Sixth Order on Reconsideration,* In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation, 10 FCC Rcd. 1226 (1994) at Appendix C, 1316-1319.

development. Consequently, the time that it will take The Golf Channel to increase distribution to 20 million subscribers, the network's break-even point, will be substantially lengthened. Indeed, if the Commission were to adopt its proposed formula and apply only a three year transition, as it suggested by way of example in its NPRM[2], it is almost a certainty that our network could not survive long enough to obtain sufficient distribution to reach break-even, given the network's substantial start-up and programming costs and early year losses. It is these dire consequences that have led The Golf Channel to oppose so strenuously the Commission's proposed revisions to the existing maximum implicit fee leased access formula and, in the event the formula must be revised, to support the formula proposed by the National Cable Television Association.

6. These same factors have also prompted The Golf Channel to propose that, should the Commission adopt any formula that results in a leased access rate that is lower than the current maximum implicit fee, the Commission accompany such change with a sufficient transition period to allow the industry, and in particular new program networks such as The Golf Channel, to adjust to the change in a way that will minimize the harm that the resulting reduction in distribution would otherwise be certain to cause. In particular, the Networks have proposed a detailed transition plan tailored to the Commission's proposal to adopt its cost/market formula. While this transition plan will still result in much slower subscriber growth than The Golf Channel assumed in its original business plan -- with penetration of 20 million not being attained

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[2]*Further Notice of Proposed Rulemaking*, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation -- Leased Commercial Access, MM Docket No. 92-266, CS Docket No. 96-60, FCC 96-122 (released March 29, 1996) at ¶ 99.

until at least their sixth year of operation, if not later -- it would at least give The Golf Channel a chance of reaching break-even and ultimate commercial viability. Absent a transition provision of the type proposed here, the Commission's adoption of its proposed leased access formula would be certain to cause the failure of our network. In the following paragraphs, I will explain the reasons for the principal features of our suggested transition plan.

7. First, should the FCC adopt its proposed cost/market formula, it will take at least six years for The Golf Channel to increase distribution on cable systems and other multi-channel video program distributors, and to develop a level of subscriber recognition and loyalty -- assuming that our proposed transition plan is also adopted -- sufficient to withstand the impact on distribution that full application of the Commission's reduced-rate formula to all set-aside channels inevitably will cause. Moreover, it will be at least six years until cable systems' channel capacity will have grown enough both to accommodate the full complement of leased access set-aside channels *and* to enable cable operators to carry start-up networks such as The Golf Channel in sufficient numbers to support the networks' continued operations. For these reasons, we are proposing that the overall transition period be no less than six years.

8. Second, a reduced-rate formula should not apply to any cable system with 72 or fewer activated channels until the expiration of the six year transition period, or until system upgrades cause channel capacity to exceed 72 channels, whichever occurs first. Cable systems with 72 or fewer activated channels generally are channel-locked, having virtually no available channel capacity on which to add new programming networks such as The Golf Channel; indeed such systems generally are still at the phase of adding more established programming networks such as A&E or Discovery. If the Commission's proposed formula were to be applied to such

systems, any remaining chance of The Golf Channel being carried by any of these systems would be lost, and The Golf Channel would likely be bumped by those few systems in this size group that do carry the network. Cable systems with 72 or fewer channels cannot be subjected to the new rate formula if The Golf Channel, and other start-up networks, are to succeed in increasing distribution to the level necessary to become commercially viable.

9. Third, the initial years of the six year transition period are the most critical to the success of The Golf Channel and other start-up networks. The Golf Channel is currently scheduled to launch on a number of systems, and is in the midst of negotiations with others. To date, the mere pendency of the Commission's leased access proposals has chilled cable systems' willingness to enter into, or even discuss, carriage agreements with the network. In order that the Commission's adoption of a reduced leased access rate formula not sabotage the network's completion of both its scheduled launches and its current negotiations, The Golf Channel needs at least one year in which the new rate formula would not be applied to cable systems, so that such burgeoning relationships not be undermined.[3]

10. Fourth, it is also critical to The Golf Channel's success that the rate formula be phased in gradually over years two through six, such that application of a reduced leased access rate formula would apply less in early years, and then to an increasing percentage of cable systems' set-aside requirements in each successive year. In particular:

a. A reduced-rate formula should be phased in for systems with between 73 and 89 activated channels,

[3] We do not seek this one-year hiatus with cable systems that have 130 or more channels, since such systems generally already possess sufficient capacity to accommodate increased leased access obligations without foregoing their ability to carry start-up networks like The Golf Channel.

beginning with application of the revised rate to 10 percent of channel set-asides by the end of year two, increasing to 25 percent by the end of year three, 45 percent by the end of year four, 70 percent by the end of year five, and 100 percent by the end of year six. Start-up programming networks have their greatest chance of being carried, if at all, by cable systems with more than 72 activated channels. Application of the Commission's proposed formula to cable systems of this size without a graduated transition would result in The Golf Channel, and other start-up programming networks, being bumped from, or not being added by, such systems during the next several years, the most crucial for The Golf Channel and other new networks.

b. The Commission's proposed formula should also be phased in for systems with between 90 and 129 channels, albeit at a slightly accelerated rate, beginning with application of the revised formula to 15 percent of channel set-asides by the end of year two, increasing to 35 percent by the end of year three, to 60 percent by the end of year four, to 90 percent by the end of year five, and to 100 percent by the end of year six. Systems of this size are also crucial to The Golf Channel's ability to obtain distribution. However, because of their greater channel capacity, it would be possible for such systems to introduce the Commission's proposed cost/market formula at a slightly accelerated rate without inordinately interfering with the launch of new networks such as The Golf Channel. This factor has been reflected in the increased rate of transition.

11. Finally, The Golf Channel believes that it is not necessary to have any delay in implementation of the Commission's proposed formula to cable systems with 130 or more channels. Such systems would appear to have adequate capacity to immediately introduce a revised leased access formula without significantly impacting their carriage of start-up networks.

12. The Golf Channel's alternative proposal of the transition provision described herein should not be deemed to indicate approval, in any manner, of the Commission's proposed leased access formula. The Golf Channel opposes that formula, and alternatively believes that, if the current maximum implicit fee formula is to be revised, the formula proposed by NCTA should be adopted instead. It is only in the event that the Commission rejects our position and goes forward with its proposed cost/market formula, that we propose the adoption of the foregoing transition plan.

13. Finally, in the event that the Commission does not adopt its cost/market formula, but adopts some other formula (including the NCTA formula) that nonetheless has the effect of reducing fees for leased access from current maximum implicit fee rates, The Golf Channel submits that the Commission must include an appropriate transition provision consistent with the transition plan described above Any such transition plan should take into consideration the extent to which the current maximum implicit fee formula is reduced, and should tie implementation of the new formula to growth in cable systems' channel capacity. As above, such transition plan should include a first year hiatus during which the revised leased access rate formula would not be applied to leased access channels on any system having fewer than 130 channels, and should introduce the application of the new formula in years two through six on a graduated basis.

I, Christopher R. Murvin, certify, under penalty of perjury, that the foregoing information is true and correct to the best of my knowledge, information and belief.

Christopher R. Murvin

May 31, 1996

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation Commercial Leased Access	MM Docket No. 92-266 CS Docket No. 96-60

SECOND AFFIDAVIT OF JEFFERI K. LEE

1. I, Jefferi K. Lee, am President of BET Networks and BET on Jazz: The Cable Jazz Channel ("BET on Jazz"). I have given a previous affidavit in this proceeding, which was submitted in support of, and as an attachment to, the Comments filed by Outdoor Life Network, Speedvision Network. The Golf Channel, and BET On Jazz (collectively, "Programmers").

2. The purpose of this affidavit is to provide additional information in support of the Reply Comments that Programmers are presently submitting in response to comments filed by other parties concerning the *Further Notice of Proposed Rulemaking* ("NPRM"). In particular, this affidavit is intended to explain the basis for, and rationale of, the transition period recommended by Programmers in their Comments and Reply Comments.

3. In developing its original business plan, BET on Jazz relied heavily upon reasonable assumptions regarding both then-extant channel availability on cable systems nationwide and on estimated increases in cable systems' channel capacity there were expected to develop over the following ten years. BET on Jazz's estimates of growth in channel

capacity were not unlike the Commission's own forecast, in its "going forward" *Order*,[1] that cable systems would increase channel capacity at a rate of nearly three channels per year. Based on those assumptions, BET on Jazz estimated that it would take at least five years from its launch date in January 1996 in which to attain subscriber penetration of 15 to 20 million, the level necessary to cover its costs, begin making a profit and become commercially viable.

4. BET on Jazz presently has 250,000 subscribers. Growth to date has been hindered by a number of factors, including among others the lack of available channel capacity on cable systems, the failure of channel capacity to expand as rapidly as predicted through digital compression and other technological advances, and even the "chill" that has been cast by the pendency of the Commission's current leased access proposals on cable operators' willingness to launch, or negotiate future carriage agreements with, new networks such as BET on Jazz.

5. A formula that reduces rates for leased access users substantially below market value, such as the cost/market formula proposed by the Commission, will artificially boost usage of leased access set-aside channels, many of which are currently used to carry new networks such as BET on Jazz. In doing so, the formula necessarily will result in a dramatic reduction in channel capacity available to start-up programmers. This reduction, both in existing channel availability and in the extent to which BET on Jazz can expect to be carried on newly added channels as systems' channel capacities expand, will significantly impede the

[1]*Sixth Order on Reconsideration*, In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 -- Rate Regulation, 10 FCC Rcd. 1226 (1994) at Appendix C, 1316-1319.

ability of BET on Jazz to increase distribution, particularly in the crucial early years of the network's development. Consequently, the time that it will take BET on Jazz to increase distribution to 20 million subscribers, the network's break-even point, will be substantially lengthened. Indeed, if the Commission were to adopt its proposed formula and apply only a three year transition, as it suggested by way of example in its NPRM[2], it is almost a certainty that our network could not survive long enough to obtain sufficient distribution to reach break-even, given the network's substantial start-up and programming costs and early year losses. It is these dire consequences that have led BET on Jazz to oppose so strenuously the Commission's proposed revisions to the existing maximum implicit fee leased access formula and, in the event that the formula must be revised, to support the formulation proposed by the National Cable Television Association.

6. These same factors have also prompted BET on Jazz to propose that, should the Commission adopt any formula that results in a leased access rate that is lower than the current maximum implicit fee, the Commission accompany such change with a sufficient transition period to allow the industry, and in particular new program networks such as BET on Jazz, to adjust to the change in a way that will minimize the harm that the resulting reduction in distribution would otherwise be certain to cause. In particular, BET on Jazz has proposed a detailed transition plan tailored to the Commission's proposal to adopt its cost/market formula. While this transition plan will still result in much slower subscriber

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[2]*Further Notice of Proposed Rulemaking*, Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation -- Leased Commercial Access, MM Docket No. 92-266, CS Docket No. 96-60, FCC 96-122 (released March 29, 1996) at ¶ 99.